687

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 22 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

CONTINENTAL NATIONAL BANK, OF MEMPHIS, TENN.,
PLAINTIFF IN ERROR,

vs.

G. C. BUFORD, DEFENDANT IN ERROR.

No. 249. 60

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

RHEA P. CARY,
Attorney for Plaintiff in Error.

WILLS & CRUMPTON, PRINTERS, MEMPHIS.

IN THE SUPREME COURT OF THE UNITED STATES.

CONTINENTAL NATIONAL BANK, of Memphis, Tenn., Plaintiff in Error,

vs. No. 343.

G. C. BUFORD, Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes to this court upon a writ of error to the Circuit Court of Appeals for the Eighth Circuit. The complaint, filed in the lower court on July 21, 1900, prays judgment against the defendant in error for the amount of certain indebtedness held by it against the Bank of Mammoth Spring, Ark., and set out fully in the complaint. The action is founded upon Sections 1337, 1346 and 1347 of Sandels and Hill's Digest of the Statutes of Arkansas, which read as follows:

"Section 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day February or of August with the County Court Clerk of the county in which said corporation transacts its business, who shall record the same at length in a book kept by him for that purpose.

"Section 1346. The certificates required by Sections 1334, 1337, 1343 and 1344, except certificates of transfers

of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"Section 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of Section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

The complaint avers that the defendant in error was president of the Bank of Mammoth Spring from June 6, 1891, to June 9, 1896, continuously (Record, p. 3), and that during the whole time of his incumbency of the office, he wholly neglected to comply with the provisions and perform the duties required of him by said Sections 1337 and 1346, by making, swearing to and causing to be filed the statement or certificate required. (Record, p. 6.)

It is averred in the complaint that "on September 6, 1894, said Bank of Mammoth Spring became indebted to plaintiff in the sum of $2,500, by note for that amount due November 8, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20, 1897, when said Bank of Mammoth Spring, being then indebted to plaintiff in the sum of $1,150 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date with interest from maturity at the rate of 6 per cent. per annum."

Other indebtedness is averred in said complaint with particularity, but I deem it unnecessary to do more here than mention the fact.

Under this state of facts, a judgment was prayed against the defendant for the debt, interest and costs.

The Circuit Court sustained the demurrer of the defendant (Record, p. 21), and plaintiff took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment of the lower court was affirmed (Record, p. 30).

Thereupon the plaintiff filed its petition for writ of error to bring the case to this court, and the same having been allowed (Record, p. 33), the plaintiff tendered and now relies upon the

following assignment of errors, which I deem unnecessary to discuss seriatim, but will treat as a whole, because they raise questions so closely allied as to make separate treatment useless:

1. The court erred in entering judgment in favor of the defendant and against the plaintiff affirming the judgment of the Circuit Court of the United States for the Eastern District of Arkansas.

2. The court erred in adjudging the sum of $20 costs in favor of the defendant and against the plaintiff.

3. The Court erred in holding that the action was barred by the statute of limitations of Arkansas of three years.

4. The Court erred in not holding that the renewals of indebtedness sued on were but continuations of same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

BRIEF AND ARGUMENT.

A demurrer was interposed by defendant which was subdivided into five sections. The first section states that the complaint shows the plaintiff's cause of action to be barred by the statute of limitations of two years. This is conclusively settled against the demurrant by the opinion in Nebraska Bank vs. Walsh (Record, pp. 12-17). where the Supreme Court of Arkansas holds the statute of three years to be the one applicable to this character of action.

The second section of the demurrer presents the vital questions in the case. It is that "the complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitations of three years." This section of the demurrer was sustained by the lower court in an opinion which is copied into the record (pp. 19-22), and is also reported in 107 Federal Rep., at page 188, et seq., and the opinion of the Court of Appeals appears in record at pages 28 to 30.

In the outset, it is probably well to determine the nature and character of this action, and of the liability which the statute under consideration imposes. The Supreme Court of Arkansas has held in the Walsh case, supra, that the action is *not a*

penal one. (Record, p. 17.) The nature of the liability imposed by the statute, and here sought to be enforced, is clearly and plainly shown in the case of Cady vs. Sanford, 53 Vermont, 632, where the Court was construing an act of the Vermont Legislature of 1860. Section 20 thereof provides "that if the president and directors of such corporation shall neglect or refuse to comply with the provisions of Section 14 (which required of them substantially the same thing as was required of the defendant in error by the statute under which this action was brought), they shall be personally liable, in an action on the statute, for all debts of such corporation contracted during the period of such neglect or refusal." The Court held that under this statute the liability of the directors "was wholly statutory, collateral to that of the company, neither greater or less in amount than the liability of the company."

Bouvier defines a collateral security as a "separate obligation attached to another contract to guaranty its performance."

1 Bouvier's Law Dictionary (Rawle's Revision), 348.

The word "collateral" is defined in 3 Am. & Eng. Ency. of Law, at p. 310, as "that which is by the side of, assists, co-operates with, is made or given in addition to some other thing *which is presented as the principal.*"

If a collateral security be as defined by Bouvier, supra, then it would seem to follow as a necessary and logical sequence, that a collateral liability is a secondary one, dependent for its enforcement upon a failure to discharge the primary or principal one.

The Court of Appeals held the liability a primary one, but cited no authority on the proposition (Record, p. 29). The following would seem to be sufficient to show that the liability is secondary and not primary.

In Tennessee the proposition is well settled that the liability of stockholders for corporate debts is a secondary one, and that creditors of the corporation must first look to the corporate assets.

Jackson vs. Meek, 87 Tenn., 69.

Albitztigui vs. Guadalupe, 92 Tenn., 603.

In the case of Powell vs. Oregonian R. R. Co. 3 L. R. A. 201, the court held "that the statute of limitations in favor of

a stockholder upon his liability for unpaid subscription did not begin to run until the creditor had exhausted his remedy against the corporation," thus showing conclusively that the liability is a secondary one.

"Even when not expressly provided by statute it is the rule, according to the weight of authority, that corporate creditors before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets."

1st Cook on Corporations, Sec. 219.

"The statutory liability of directors for debts contracted in excess of a certain amount is secondary and can be enforced only after execution returned unsatisfied against the corporation."

Auburn National Bank vs. Dillingham, 147 N. Y., 603.

Upon another theory, however, and independent of the Vermont case, I submit that the same result is reached. To demonstrate: The following language used by the Arkansas Supreme Court in the Walsh case, supra (Record, p. 14), establishes the character of the liability as one equivalent to an indemnity:

> "The duty which the statute enjoins upon, and the liability it creates against the officers, is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, *for compensation and indemnity*, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result directly or indirectly from their negligence or failure."

Indemnity is defined by Bouvier as "that which is given to a person to prevent his suffering damages." An indemnity contract is said, in 16 Am. & Eng. Ency. of Law (2d Ed.), 168, to be "an agreement between two parties whereby one agrees to indemnify and save harmless the other from loss or damage in connection with some particular transaction, or to protect him against liability to or the claim of a third person."

If an indemnity contract be as above defined in the Encyclopedia, then it seems reasonable to conclude that an indemnity liability is one which protects or saves harmless another from

loss or damage in connection with a particular transaction. The liability, of course, does not accrue until the loss or damage occurs, and, therefore, it is a secondary and not a primary one.

Upon still another principle, the same consequence must follow. The Arkansas Supreme Court, in the Walsh case, supra, says:

> "The prime object of making statutes strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them, and in statutes primarily and properly penal, the provision for punishment now rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from like offenses. It would therefore be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duty enjoined by it was ignored. ('Black's Law Dic. Penal Statutes.' 'Penal Laws;' Bonner's Law Dic., 'Penal Statutes;' Potter's Diaries on Statutes and Constitution, 74.) Reassured by these simple but infallible tests, the statutes upon which this action is based is not penal. *Here the behest of the law may be ignored repeatedly by the officers failing to file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had contracted with the corporation during the period of such disobedience, and even then the officers could be made to pay only at the instance of these creditors, and not by them if the debts had already been paid by the corporation.* This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute, and that the punishment of the officers for failure to perform the duties it prescribed is not the dominant idea."

This ought to be sufficient to show that the liability is a conditional one, one depending upon a contingency.

When these features are considered, it seems impossible to reach any other conclusion than that the liability is secondary, and cannot accure until the primary one has attached.

The nature of this action and of the liability created by it being determined, the next question is as to when the statute began to run. In his opinion (Record, p. 18), the Circuit Judge says that the defendant's liability began the moment the debt was contracted, and continued three years. I submit that this is manifest error, and for these reasons: It certainly continued until the statute of limitations extinguished it, and this could not be done until the statute had run for three years. The statute could not be put into operation until the maturity of the debt. Had the plaintiff sued the defendant on August 19, 1897 (the day before the first note sued on herein fell due), can it be doubted that a plea in abatement for prematurity of suit would have been sustained. In other words, can one person, made liable by statute for the debt of another, be required to pay it before maturity and before the party primarily liable has been afforded an opportunity to do so? Can any suit be maintained which has for its foundation an unmatured debt? The mere statement of the proposition is a refutation of it, and it is difficult to see how it could be contended otherwise.

The Court of Appeals declined to take the view of the Circuit Judge, but held that in any event the statute of limitations began to run at the maturity of the first notes. (Record, p. 29.)

The general rule is that "the statute of limitations begins to run from the time the plaintiff's cause of action accrues, unless some recognized exception postpones its operation. This rule is never questioned; the difficulty lies in determining when the cause of action is to be deemed as having accrued."

19 Am. & Eng. Ency. of Law (2d Ed.), 193.

We have already seen that the liability created by the statute under consideration is a conditional one, or one depending upon a contingency. Upon this point the Encyclopedia (Vol. 19, 2d Ed., p. 193) says: "The right of action on a claim depending on a contingency or condition does not accrue until the happening of the contingency or the fulfillment of the condition, and the statute does not begin to run until then."

In support of this principle I here quote in full the opinion of the New York Supreme Court in Jones vs. Barlow, 62 N. Y., 202:

> "Allen, J.: The appellant and his co-trustees of the American Seal-Lock Company, became liable for the debts of the corporation by reason of the failure of the corpora-

tion to make and file a report as required by law. There was a default in making such report in January, 1871. The entire indebtedness accrued and became due between May, 1871, and January, 1872, after the default in making the report had been made and filed.

"The trustees of the corporation became, and were from the time the debt was contracted, liable for its payment under the statute. (Laws of 1848, Chap. 40, Sec. 12.)

"The statute is, that upon the failure to make the report mentioned, 'all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made.'

"Their liability is co-extensive and concurrent with that of the corporation. It is subject to the same conditions and qualifications that attach to the original indebtedness and whatever would defeat or abate an action against the corporation will serve as a shield and defense to the trustees.

"If the debt of the corporation is qualified or payable in the future it does not become an absolute obligation or a debt payable in presenti, when sought to be enforced against the trustees. No penalty attaches for the default if there be no debt, it is the debt which under the statute gives the right of action and which is recovered. If there be no obligation giving a present right of action against the company, no debt or duty which may be presently demanded from the corporation, there is no debt or duty which can be demanded under the statute as a penalty against the trustees. The language is quite explicit and imposes the liability for the debts of the company: and there is no debt within the meaning of the statute if the day of payment has not arrived. The object of the statute was to give the creditors of the corporations, founded under it, security for the performance of the obligations and payment of the debts of the company. The creditor gets all the protection designed by the statute if he has a co-temporaneous and concurrent remedy against the defaulting trustees and the company. Although the obligation is wholly statutory and adjudged to be a penalty, it is in substance as it is in form, a remedy for the collection of the corporate debts. The act is penal as against the defaulting trustees, but is remedial in favor of the creditors. The liability of defaulting trustees is measured by the obligation of the company, and a discharge of the obligations of the company or a release of the debt, bar the action against the trustees. No action lies for any penalty independent of a debt due by the corporation; so, too, a recovery, against the trustees and a payment by them of the recovery operates to discharge the obligation of the company to the creditor, and bars an action at his

suit. The remedy against the company and the trustees are concurrent, but there can be but one satisfaction. Whether the trustees would be subrogated to the right of the creditor against the corporation, upon payment by them, will not be considered. The penalty is incurred by the default, but the liability to any individual creditor does not become absolute until a debt shall exist which is within the terms of the statute, and a default in payment has been made by the corporation. It would not be contended by anyone that for merchandise sold the corporation, upon an agreed credit, while the trustees are in default for not making the statutory report, an action would lie against the trustees at once, and before the expiration of the term of credit. The law does not vary the contract of the parties, or absolve either from its performance or an observance of its terms. In such cases there would be a liability, but it would be dormant, and not constitute a cause of action until the debt shall become due.

"If this be so, it follows, as a necessary sequence, that if, after the debt should become payable by the corporation, the right to demand payment and the cause of action against the corporation should, by the act and consent of the creditor, be suspended, the liability of the trustees, as the incident of the principal obligations would become suspended, pro tempore dormant, to be revived by a new default of the corporation. Whatever limitations and conditions attach to the corporate and primary obligations, whether attaching to it at its inception or growing out of subsequent lawful agreements of the parties, necessarily limit and qualify the liability of the trustees, which, as before said, although final in its character, as adjudged as founded upon the debt, can only be enforced by reason of its existence, and according to the terms annexed to it.

"The Merchants' Bank of New Haven vs. Bliss, 35 N. Y., 412, applies the short statute of limitations, prescribed to actions for penalties by Section 92 of the Code, to this class of actions, but it does not purport to define who are creditors authorized to sue, or from what time the statute begins to run. It can only commence to run from the time a cause of action accrues. It does not begin to run from the time of the default in making the report, else, upon a continued default of three years or more, no action would lie against the trustees for debts contracted after that time. Miller vs. White, 50 N. Y., 137, is only authority for the statement that a judgment against the corporation is not evidence of the existence of the debt as against the trustees. This does not militate against the claim of the appellant that the debt against the corporation, however it may be proved, must be actually due at the time of the commencement of the action against the trustees.

"The principle which is invoked, that the trustees are not, technically and conventionally, sureties of the corporation, and, therefore, are not discharged from their liability by dealings of the creditor with the primary debtor, does not aid the plaintiff. The liability may be collateral to the original undertaking and still not capable of being enforced, except at the time and upon the terms and conditions prescribed by the original and primary obligation. A sufficient reason would exist for not holding the trustees discharged by giving time to the principal, even if the strict relationship of surety existed. The act of extesion is the act of the trustees, and, regarding them as sureties, they have assented to it, and are, therefore, not discharged. (Wright vs. Storrs, 32 N. Y., 691). Upon the same principle, the act of extension being regarded, as it must, a transaction between the creditor and the trustees, it cannot be presumed that, the time of the original debt having been extended upon good consideration, either party contemplated that the trustees, thus arranging and agreeing, should be sued the next moment for the same debt. Such an action would be a breach of good faith, even if allowable by a strict interpretation of the act. But, I am of the opinion that the trustees are not liable to an action, except for debts actually due, and for which a present right of action exists against the corporation. It follows from these views, that the plaintiff was not entitled to recover, except for the sum actually due from the corporation at the time of the commencement of the action. This would exclude from the recovery of the three notes, two $629.26 each and one for $629.34, payable, respectively, in eight, nine and ten months from the date thereof, with interest thereon.

"The judgment must, therefore, be reversed, and a new trial granted, costs to abide event, unless the plaintiff stipulates to reduce the recovery by deducting from the judgment the sum of $1,187.86, and interest from June 6, 1872, to the 18th of March, 1874, amounting, in the aggregate, to $2,056.44; and, in case the plaintiff so stipulates, the judgment, as thus modified, is affirmed, without costs to either party in this court.

"All concur with *Allen, J., except Folger, J., dissenting.*

"The statute (of limitations) begins to run from the time the cause of action accrues in favor of the creditor, and not from the time of default on the part of the directors, as a failure to file a report."

Clark on Corporations, p. 611.

If this suit could not be maintained until the maturity of the

debt, then the sole question is, when did the debt sued on ma. ture? The contention of the plaintiff is that the debt matured August 20, 1897, less than three years before the filing of the complaint. If this contention be well founded, the decree of the lower court should be reversed.

Upon this point the Circuit Judge said: "If it be said that the debt was renewed from time to time, and the last note therefor executed on May 20, 1897, there are two answers: First, a renewal of a note is not the contraction of a debt. It is simply the execution of a note, as evidence of a debt previously contracted. Plaintiff's brief contains citations which, I think, conclusively establish this proposition. Secondly, if the execution of the renewal note of May 20, 1897, was the contraction of the debt within the meaning of the statute, then the answer is, defendant ceased to be president in June, 1896, and the times provided by the statute for making and depositing two certificates had occurred, after he ceased to be president, and before the note was executed."

The infirmity of this argument is best shown by this illsutration: Suppose the original note of September 6, 1894, had been made to mature three years after date, instead of on November 8, 1894. It would then have fallen due on September 6, 1897, and no action could have been maintained on it until that time. Had this suit been on that note, the only possible question would have been as to whether the statute of limitations began to run before the maturity of the debt, and this question, I apprehend, should be entitled to no consideration.

Then if the effect of repeated renewals is the same as if the original debt ran for the same length of time as covered by the renewals, an easy solution is at hand of any apparent difficulties in this case. If a renewal is but a continuation of the same debt, then several renewals cannot change it, and it necessarily follows that the effect is the same as if the original debt had been made to run over the same length of time covered by the renewals.

In the plaintiff's brief authorities were cited which the Circuit Judge, in sustaining the demurrer, says conclusively establish the proposition that the renewal of a note is not the contraction of a debt, and that successive renewals of a note are only evidences of the original indebtedness I assume that this is not disputed. Then the following conclusions are not to be avoided: That the indebtedness evidenced by the notes sued on was contracted during the defendant's incumbency as presi-

dent of the Bank of Mammoth Spring; that the plaintiff's right of action accrued on the day of the maturity of the note, which was August 20, 1897, which day was less than three years before the commencement of this suit.

The authorities which in the opinion of the lower court conclusively establish the proposition that the renewal of a note is not the contraction of a debt, and referred to in the last paragraph above, are here set out at length as follows:

> "To renew, in its popular sense, is to refresh, revive or rehabilitate an expiring or declining subject, but it is not appropriate to describe the making of a new contract, or the creation of a new existence."
>
> 20 Am. & Eng. Ency. of Law, 1034.

> "A note taken in renewal of a former note is not regarded as payment of it."
>
> 10 Am. & Eng. Ency. of Law, 876.

> "In order to make one instrument an extinguishment of another, the latter must be of higher dignity than the former, or must put the plaintiff in a better condition; neither of which is the case where a renewal is made. It benefits the maker by giving him a further day of payment, but does not place the plaintiff in a better condition than before."
>
> McGuire vs. Gadsby, 3 Call (Va.), 234.

It is a well-settled rule of the construction of pleadings, that demurrers are not favored, but that every intendment is in favor of the pleading demurred to. It is also settled that upon the hearing of a demurrer, every allegation of the complaint is to be taken as true. Applying these two rules to the case at bar, it would seem that the complaint averring that the indebtedness was "renewed" (not extinguished or discharged), should make it demurrer-proof.

> "The mere taking of one note in renewal of another, is not a satisfaction of the first."
>
> Gresham vs. Morrow, 40 Ga., 487.

> "The renewal of a note at the same rate of interest, is not a novation. Therefore, where a collateral to secure a note was placed in the hands of the creditor, and the note was renewed at the same rate of interest, and with the same parties, the debt was the same, and the collateral security remained as securing it."
>
> Partridge vs. Williams, 72 Ga., 807.

"Where a note or draft is taken in renewal of a former one the presumption of law will be that the new note is not a payment of the old one, as between the parties thereto, in the absence of anything showing a contrary intention."

Bank vs. Bornman, 124 Ill., 200.

"This Court has repeatedly recognized the rule, that an expressed agreement must be shown to establish the fact that the bill or note, of either the debtor or the third person, was taken by the creditor in payment of a pre-existing debt."

Brown vs. Olmstead, 50 Cal., 162.

"The giving of a promissory note in renewal of another, does not necessarily operate as a payment.

"In order to have that effect, it must be understood and intended by the parties."

Jansen vs. Grimshaw, 125 Ill., 468; 17 N. E., 850.

"As a general rule, a new note given in renewal of another one, will not be regarded as a satisfaction of the first, unless there is an expressed or implied agreement to that effect."

Chisholm vs. Williams, 128 Ill., 115; 28 N. E., 215.

The case of Hill vs. Marcy, 49 N. H., goes even further than is contended for by the plaintiff in this case. There the Court held, that, "the law is understood to be well settled in this State, that a negotiable promissory note, taken for and on account of the precedent debt, is not payment of that debt, unless it is so agreed by the parties; and the burden is upon the party asserting the fact of payment to prove it."

Again, in the case of Jones vs. Rider, 60 N. H., 452, the Supreme Court of that State held that "A note is not payment of a pre-existing debt, unless expressly so agreed."

"A promissory note of a debtor given in renewal, or in place of a similar in form, and by the same party, is not a discharge of the liability existing on the first note, although the latter is given up."

Bank vs. Morgan, 6 Hun., N. Y., 346.

"The renewal of notes from time to time in no way extinguishes the original debt; it is simply an extension of the time of payment, and a change as to the evidence of the debt."

Holland Tr. Co. vs. Waddell, 75 Hun., N. Y., 104.

"It is settled in this State by repeated decisions, that giving a note for an antecedent debt does not absolutely

pay the debt, unless it is given and received as payment, and that the burden is upon the debtor to show that it is so given and received."

Nightingale vs. Chafee, 11 R. I., 609.

"There is no ground for the position that the renewals must be regarded as a payment for the whole debt. The rule on that subject is, that a note, or other promise to pay, is never considered as payment of a precedent debt, unless there is a special agreement to that effect, or unless it actually produces payment, and the onus is upon the party alleging such payment, to prove it."

Bank vs. Gunhouse, 17 S. C., 489.

"Upon familiar principles, if a note is taken as an additional payment, or in renewal, and is not duly paid or discharged, the original debt revives; and this principle applies to every renewal, which is but a continuation of the same debt. Nor is it material, whether the note, or bill, be given for a precedent or co-temporary debt; in either instance it will operate as an extinguishment or payment, unless it be so accepted by the creditor. If not paid at maturity, the creditor may sue upon it, or upon the original cause of action."

Moses vs. Trice, 21 Gratt, Va., 556.

In the case of Bank vs. Jones, 10 Wash., 185, the lower court instructed the jury as follows: "When a bank takes a note, a new note in place of one which has become due and matured, the law presumes that a payment of the note; that presumption can be rebutted, however, by testimony showing a different agreement between the parties; but without any agreement, it is presumed to be a payment."

Upon appeal, the Supreme Court of Washington, held as follows: "Appellant claims that this was also error. Upon this question, the decisions are not harmonious, but we are inclined to the opinion that the great weight of authority is in favor of appellant's position, that payment is not presumed in such cases, but is a question of fact, depending upon the intention of the parties."

"The giving of a new note for an old one which has become due, the amount and maker of the two notes being the same, will not be treated as a payment or extinguishment of the old note, or the pre-existing debt, unless the parties so expressly agree; but it will be regarded merely as an extension of credit."

Bank vs. Goode, 21 W. Va., 455.

"The doctrine is well settled, both in Virginia and this State, that the giving of a new note for a previous one which has become due, will not be regarded as an absolute extinguishment or payment of the precedent note, or pre-existing debt; unless it is so expressly agreed, whether the new note was that of one previously bound, or of a stranger. (Dunlap vs. Shankin, 10 W. Va., 662; Feamster vs. Withrow, 12 Id., 611; Bentz vs. Basnett, Id., 772; Bank vs. Goode, 21 Id., 445, 465, and the cases therein cited.)"

Hess vs. Dille, 23 W. Va., 90.

"It is a mistaken idea of counsel that the giving of a promissory note by the debtor, operates as an absolute payment or extinguishment of the original debt, or changes its nature. This is not so. Unless the note is expressly given and accepted in satisfaction and discharge of the debt, it only suspends the remedy upon it during its currency, and upon its dishonor or non-payment if in the hands of the payee, it may be disregarded, and suit brought for the original indebtedness. Chitty on Contracts, p. 660."

Blunt vs. Walker et al., 11 Wis., 334.

"Where A and B executed a note on January 10, 1873, at four months, for $5,000, which was discounted by the Covington National Bank, and at its maturity, A, the principal gave his check upon that bank for the amount of the note and took it up, and A and B gave a new note which was discounted by the bank, and the proceeds placed to A's credit to pay the maturing note, and this transaction was repeated at intervals of four months until February 23, 1878, when the note in suit was executed, held that the debt created in January, 1873, had not been paid, and that these new notes were merely renewals."

Lee vs. Hollister, 5 Federal Rep., 752.

Wait on Fraudulent Conveyances, Section 89, says, in speaking of the rights of existing and subsequent creditors to set aside fraudulent conveyances: "A party loses no right by a change of securities, and the holder of a new note given in exchange for an old one, may attack a conveyance which is fraudulent as to the old note."

Surely this could not be if the old note were extinguished or discharged, and if the new note was a new, separate and distinct debt.

Trezevant vs. Terrell, 96 Tenn., 528, was a case where Trezevant's assignors were creditors of Terrell's several years back, and at the time of the alleged fraudulent conveyance, sought to be set aside. The form of the debt was subsequently changed,

and it was embraced in the notes sued on. The Court says: "The first ground of demurrer is, that the bill shows on its face that all the notes sued on are of a date subsequent to the date of the deed, and the alleged pre-existing debt being embraced in said notes, is thereby, also made a subsequent debt, and cannot affect the validity of the conveyance, in the absence of an allegation of fraud, which is not made in the bill. The contention of counsel for Mrs. Terrell is, that the alleged pre-existing debt of $9,563.64, had been mingled by the creditors with the large debt created after the conveyance, and that complainants are therefore subsequent creditors only. The Court thinks this contention is unsound. Mr. Bump, in his work on Fraudulent Conveyances, 2d Ed., p. 498, states the law on this subject as follows:

> "'The rights of a creditor, however, arise from the fact that a debt is due. Any change, therefore, of the evidence of the existence of a debt, does not exert any influence upon those rights. Evidence may be introduced to show that a judgment is founded upon a prior claim. A note may be shown to be given for a prior account, or in renewal of a prior note. A novation does not affect the rights under the debt.' The author states, however, 'that a renewal by which a liability is created different from that created by the original debt, is a new debt.'"
>
> "The giving of a promissory note in settlement of an account, does not operate as an absolute payment, unless 'the parties expressly or impliedly agree to treat it as such.'"
>
> Brugman vs. McGuire, 32 Ark., 733.

"The acceptance by a creditor of the note or bill of a third party for his debtor's debt does not discharge the debtor, unless so especially agreed by the parties."

Akin vs. Peters, 45 Ark., 313.

"The taking of the note, bill or check of a debtor, or of one of several joint debtors, or of a stranger for the antecedent indebtedness, is no payment, unless it is agreed to be taken as such. It is only conditional payment, dependent on the payment of the paper. If that is dishonored, the original debt revives (citing authorities). Such has been the settled law of England ever since the time of Lord Holt (citing an English case), and such is the law of all the American States, except Massachusetts, Maine, Vermont, Indiana and Louisiana.

"The more recent decisions of this Court are in perfect harmony with this rule." (Citing Brugman vs. McGuire,

supra; Akin vs. Peters, supra, and Malpas vs. Lowenstein, 46 Ark., 552.)

Henry vs. Couly, 48 Ark., 267.

"In the substitution of a new debt or obligation for an old one, which is denominated in the civil law a novation, the intention of the parties to that effect should be positively declared; or at least in whatever manner expressed it should be so evident as not to admit of a doubt; in other words, a novation is not to be presumed unless the intention to that effect evidently appears. Story on Bills, Sec. 441; Burge on Suretyships, 166; Chandler vs. Herrick, 19 Johns, 132."

Cockrill vs. Johnson, 28 Ark., 193.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Reported in 53 C.C.A. at page 14.

Judge Caldwell opens his opinion with the statement that "it is settled by the decision of the Supreme Court of Arkansas in the case of the Nebraska National Bank vs. Walsh, 68 Ark., 21, that the statute on which this action is founded *is a remedial statute* and imposes a statutory liability and not a penalty."

Bouvier (Rawle's Revision) 1032, defines a remedial statute as "one made to supply such defects and abridge such superfluities in the common law as may have been discovered."

Clearly, this definition is not applicable to the statute involved in this suit, but the same author, in the next paragraph, gives one that is. He says: "The term *remedial statute* is also applied to those acts which *give the party injured* a remedy."

I think it is safe to asume that the learned Court of Appeals used the term "remedial statute" in its proper legal sense and signification, and that, therefore, it meant to, and did hold that the statute involved herein was one which gave the injured creditors of an Arkansas corporation a remedy.

Then it must necessarily follow that the liability created by this remedial statute did not become enforceable unless and until the injury occurred. It would seem that no argument is necessary to sustain this proposition, and I shall not so affront appellee's learned counsel as to anticipate any attempt to refute it.

But the learned Judge says, on page 29 of the record, that the defendant's "liability was primary and not secondary," a statement to my mind wholly irreconcileable with the opening remark.

If the liability of the defendant did not become enforceable until injury occurred to the creditor, then it was necessarily postponed until the maturity of the debt and the failure of the debtor to pay. The creditor certainly was not injured until default made by the debtor, and the Court virtually holds in the opening sentence of its opinion that the officer of the corporation could not be sued until such injury.

True, the third paragraph of the opinion contains the statement that it is not essential to determine whether the defendant could have been sued the day after his corporation created the debt, but I submit that the effect of the holding that the statute in question is a remedial one, is to hold the right of action against the defendant accruable only when the creditor is injured, and surely that only occurs upon default of the debtor.

It is said in the concluding sentence of the fourth paragraph of the opinion, that the defendant's "legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank or to any proceedings against it to enforce payment."

This may be entirely true, and still I submit that it was not then enforceable even though it had attached. At the risk of tediousness, I will repeat the illustration used in another portion of this brief, by supposing that the original indebtedness sued for herein had been made payable four years after date.

Then, unless the defendant's liability was unenforceable until the maturity of the note, we would have the strange and anomalous situation of a statute of limitations barring his liability upon a debt *before that debt had matured.*

I do not believe that this Court would hold any such proposition.

Then, if this position be correct, the whole question resolves itself down to the simple point as to whether the renewals constituted the same debt and were but continuations thereof, or whether they were new debts entirely.

The authorities upon this proposition have been heretofore submitted, and further comment upon them will not be made here.

Another view to be taken of the case is in respect of the intention and meaning of the statute. The Legislature evidently intended to furnish indemnity to the creditor, and *to secure the debt.* It would be a poor sort of indemnity which protected the

creditor during a portion of the life of his debt and not longer, and a security for a debt which was survived by the debt itself would be but a farce and a sham.

I do not discuss the third, fourth and fifth subdivisions of the demurrer, the last because it is too general, and the third and fourth because a casual glance at the complaint will show that they have no foundation in fact.

I respectfully submit that the judgments of the lower court and of the Court of Appeals should be reversed and the case remanded back for answer and trial.

RHEA P. CARY,

Attorney for Plaintiff in Error.